No. 85-716

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHNNY VEAL,

Petitioner,

vs.

RICHARD DeROBERTIS, Warden,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should grant certiorari in order to resolve a question of state law previously decided by state courts.

2. Whether petitioner has demonstrated cause for his procedural default in failing to make an adequate offer of proof where the issue involved was not novel, where petitioner's attempted offer of proof was meaningless and where petitioner sought none of a variety of alternative means to procure the testimony of his alleged witnesses.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Johnny Veal ("petitioner") and George Knights were tried and convicted in the Circuit Court of Cook County, Illinois, of the July 7, 1970 murder of Chicago Police Officers James Severin and Anthony Rizzato. Petitioner was sentenced to concurrent terms of imprisonment of not less than 100 and not more than 199 years. The Illinois Appellate Court affirmed petitioner's convictions. *People v. Veal*, 58 Ill. App.-3d 938, 374 N.E.2d 963 (1st Dist. 1978). The Illinois Supreme Court denied leave to appeal and

this Court denied certiorari. *Veal v. Illinois*, 441 U.S. 908, 99 S.Ct. 2001, 60 L.Ed.2d 378 (1979).

Petitioner then moved for a writ of habeas corpus pursuant to 28 U.S.C. 2254(a). The writ was granted, *United States ex rel. Veal v. Wolff*, 529 F. Supp. 713 (N.D. Ill. 1981), with the court finding that petitioner was denied a fair trial by the application of the Illinois Notice-of-Alibi statute. Respondent appealed and the appellate court reversed the judgment of the district court and ordered an evidentiary hearing. *United States ex rel. Veal v. DeRobertis*, 693 F.2d 642 (7th Cir. 1982) (Coffey, J., Diss.). The court concluded that Illinois law required petitioner to make an offer of proof concerning the contents of the alleged alibi testimony and that petitioner's failure to do so constituted waiver of any error under Illinois law. As a result, petitioner was required to demonstrate "cause" for this procedural default. *United States ex rel. Veal v. DeRobertis*, 693 F.2d at 647-650. The court also concluded that an evidentiary hearing should be held to determine whether the abibi witnesses existed and whether defense counsel's alleged fear for the witnesses' safety was reasonable. *Id.*, 639 F.2d at 650-651.

On remand, the district court referred the cause to a magistrate with instructions to conduct an evidentiary hearing and to file a report and recommendation pursuant to 28 U.S.C. 636(b)(1)(B) and F.R.C.P. 56(c). At the hearing, Sam Adam ("Adam"), petitioner's trial attorney, testified on behalf of petitioner. (R. 13) Adam indicated that at some time during the prosecution's case-in-chief investigator Lavern Townsend ("Townsend") indicated that witnesses were available to testify for petitioner. (R. 40) Adam then interviewed four "young, black teenagers." (R. 42) Townsend and R. Eugene Pincham, counsel for co-defendant, Clifford Knights, were also present. (R. 42)

The first potential witness indicated that he was afraid to testify because "law enforcement agencies" would learn his name and address. Adam testified:

> I told him that, of course, if he testified, and I want him to testify, he would have to reveal his name and address. He said that he was most concerned that no one visit his mother or his family. [A]nd I said I will give you my word that no one will visit your family, because no one will know your name or your address until you have testified, and then you have become a witness, and no one would dare to try to influence the testimony of a witness that has been a witness . . .

(R. 44) During trial Adam told the court that the "alibi witnesses would testify that Johnny Veal was at a place other than the place from which the shots were fired at the time the shots were fired." (R. 40) The prosecution asked for the identity of the witnesses, which Adam refused to disclose. (R. 51) The trial court ruled prior to the defense case that the alibi evidence was inadmissible. Concerning the possibility of making an offer of proof *in camera*, Adam testified:

> I don't recall if I even considered it or not. I may have considered it but—but if I did, I rejected it. And I'm not certain that I even considered it.

(R. 97) Adam further testified that one of the trial prosecutors assured him that nothing would happen to the witnesses. (R. 101) Adam testified that he never saw the witnesses after the trial court's ruling and did not try to contact them. Townsend took written statements from the men and gave them to Adam, who had the statements during trial. (R. 35, 36, 121) Following trial Adam released his files including the written statements to Townsend, (R. 48-49) who assisted other attorneys in the representation of petitioner on appeal. (R. 28-29) Townsend died

in 1980 and in 1983 Adam's secretary unsuccessfully attempted to locate the written statements in Townsend's files.

At the conclusion of the evidence the magistrate concluded that, "the net result of Adam's testimony at this time is that it provides no more specific detail or information than that presented at the trial level." The magistrate recommended, despite the fact that "no corroborative, objective fact exists to confirm Adam's testimony," that the district court find that the alibi witnesses existed and were available to testify. The magistrate also recommended that petitioner had not established sufficient cause for the failure to make an offer of proof because petitioner failed to consider or attempt other means to present the alibi testimony. For this reason the magistrate recommended that the writ be denied.

The district court adopted the magistrate's recommendations and further concluded that petitioner failed to demonstrate cause because of counsel's "failure to provide the trial judge with information about the witnesses *in camera*." *United States ex rel. Veal v. DeRobertis*, 586 F. Supp. at 21. The court concluded:

> [T]hat some alternative measures of protecting the witnesses did exist and that [petitioner] has not shown good cause for failing to make an adequate offer of proof at his trial.

586 F. Supp. at 21.

The Seventh Circuit Court of Appeals affirmed the district court's judgment in an unpublished order. (Pet's. App. A) Petitioner now seeks certiorari to review the decision of that court.

REASONS FOR DENYING THE WRIT

I.

THIS COURT SHOULD DECLINE TO REVIEW THE QUESTION OF WHETHER AN OFFER OF PROOF WAS REQUIRED WHERE THE ILLINOIS COURTS DETERMINED, BASED ON STATE LAW, THAT SUCH AN OFFER WAS NECESSARY.

It is undisputed that petitioner failed to make an adequate offer of proof at his state court trial. Petitioner now urges that such an offer was unnecessary. (Pet. at 8-9) Respondent contends that certiorari is not proper to review petitioner's claim where Illinois reviewing courts determined, as a matter of state law, that an offer of proof was necessary.

In reviewing petitioners convictions, the Illinois Appellate Court found that an offer of proof was necessary and that petitioner's failure to make the offer meant that the present claim was waived. The court stated:

> [W]e are greatly troubled by the lack of any real offer of proof concerning [the] alibi witnesses. Defendant Veal was represented at trial by a very able and experienced member of the criminal trial bar. Yet his only offer on this issue was that he had four witnesses who would testify that defendant Veal was elsewhere than the scene of the crime. We cannot speculate where these witnesses would have placed him in the same place. Without an offer of proof we have no way of knowing the materiality of the evidence sought to be proved through these witnesses. *People v. Burris*, (1971), 49 Ill.2d 98, 273 N.E.2d 605; *People v. Bridgeforth*, (1972), 51 Ill.2d 52, 281 N.E.2d 617.

374 N.E.2d at 992. The Illinois Supreme Court denied leave to appeal from the appellate court decision.

Habeas relief is available solely to correct errors of constitutional magnitude. *United States ex rel. Burnett v. Illinois*, 619 F.2d 668, 671 (7th Cir. 1980), *cert. denied*, 449 U.S. 880 (1981); *Cramer v. Fahner*, 683 F.2d 1376, 1381 (7th Cir. 1982). The question involved here concerning the need for an offer of proof was resolved in the state court based on the court's citation to relevant state precedent. Therefore, it is not one of constitutional magnitude and is not cognizable in a habeas proceeding. *Wainwright v. Stone*, 414 U.S. 21, 23-24, 94 S.Ct. 190, 38 L.Ed.2d 179 (1973). For this reason this Court should decline review of this cause.

II.

PETITIONER FAILED TO DEMONSTRATE CAUSE FOR HIS PROCEDURAL DEFAULT WHERE THE ISSUE INVOLVED WAS NOT NOVEL, WHERE PETITIONER'S OFFER OF PROOF WAS MEANINGLESS AND WHERE PETITIONER SOUGHT NONE OF THE AVAILABLE ALTERNATIVE MEANS TO PROTECT THE ALLEGED ALIBI WITNESSES OR TO PROCURE THEIR TESTIMONY.

After the trial court ruled in a manner excluding the alibi evidence, petitioner was obligated to seek alternatives allowing the introduction of the evidence or, in the alternative, was required to inform the court of the specific nature of the evidence. Petitioner failed to do so despite his unreasonable fear for the safety of his witnesses, the availability of other means to protect the witnesses and the existence of available means allowing the presentation of the specific nature of the contested evidence while at the same time protecting the identity of the witnesses. Petitioner failed to pursue any of these possibilities. The Seventh Circuit previously stated that it could not, "understand (counsel's) exaggerated response

in failing to even consider reasonable alternative actions which would have protected (the witnesses) while at the same time supplying the court with important and necessary information." *United States ex rel. Veal v. DeRobertis*, 693 F.2d at 651. At the evidentiary hearing conducted in this case counsel failed to provide an adequate explanation for this conduct. Counsel freely admitted that he did not attempt any alternatives and further stated that if he considered any such possibilities, he quickly rejected them. As a result, respondent contends that, under the decisions of this Court, petitioner has failed to demonstrate good cause for his failure to attempt other means to present the alibi evidence and his failure to make an adequate offer of proof. *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1976); *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982).

The focus of a "cause" inquiry must be on the reason why counsel failed to comply with the state procedural rule. *Garrison v. McCarthy*, 653 F.2d 374, 377 (9th Cir. 1981). Habeas relief should not issue where the remedy is used to undermine state procedural rules. *United States ex rel. Crist v. Lane*, 764 F.2d 754 (7th Cir. 1984). Such an undermining occurs where the petitioner has the means during state proceedings to comply with the state procedural rule and fails to do so. *Thomas v. Auger*, 738 F.2d 936 (8th Cir. 1984). Petitioner here has failed to demonstrate cause where he has provided no valid reason for his procedural default and where his strategy was simply to create an issue on appeal based on an attack on the notice-of-alibi statute. This conduct fulfills the precise fear of "sandbagging" discussed with obvious disapproval in *United States ex rel. Broadnax v. DeRobertis*, 565 F. Supp. 327 (N.D. Ill. 1983), and *United States ex rel. Allen v. Hardy*, 577 F. Supp. 984 (N.D. Ill. 1984).

Respondent contends that the lower courts correctly determined that counsel's alleged fear for the safety of the alibi witnesses was unreasonable. *Veal v. DeRobertis*, 586 F. Supp. at 21. Although petitioner was charged with the murder of the two police officers, the trial in this case took place a year after the shootings. The only allegations of police misconduct stemmed from incidents occurring during the intense police investigation immediately following the incident. In addition, other persons from the community appeared and testified for co-defendant Knights, without incident, despite the disclosure of their names and addresses during the course of pre-trial discovery. For these reasons, it is clear that petitioner "has failed to articulate any reasonable basis for the concern for the witnesses' safety at the time of (petitioner's) trial." *Veal v. DeRobertis*, 586 F. Supp. at 21.

In addition, it is clear from counsel's testimony that an obvious remedy was available which would have allayed his fear for the safety of the witnesses. Adam testified that he was concerned about the witnesses only before they testified because after they testified "no one would dare try to influence the testimony of a witness." (R. 44) However, as counsel was undoubtedly aware, Illinois law protected witnesses and potential witnesses alike. At the time of trial, *Ill. Rev. Stat.*, 1961, ch. 38, sec. 32-4(b) provided:

> A person who, with intent to deter any party or witness from testifying freely, fully and truthfully to any matter pending in any court, . . . forcibly detains such party or witness, or communicates directly or indirectly to such party or witness any knowingly false information or a threat of injury or damage to the property or person of such party or witness or to the property or person of any relative of such party or witness . . . commits a Class 4 felony.

It is clear that this provision applied equally to prospective witnesses and witnesses who had testified. Therefore, the moment counsel disclosed the names of the alleged alibi witnesses they would have had the same protection under Illinois law that counsel found acceptable after their testimony.

As the lower courts also noted, the record shows that petitioner made no attempt to protect his witnesses by some means other than non-disclosure of their identities. *Veal v. DeRobertis*, 586 F. Supp. at 21. The courts specifically found that several means of protection were open for consideration and that counsel for petitioner had failed to seriously consider them. Petitioner did not contact the FBI, the Illinois Attorney General, the U.S. Attorney, the Cook County Public Defender, the Federal Marshal, community groups or the media. (R. 126-128) The district court correctly concluded that, "some alternative measure of protecting the witnesses did exist, . . .". 586 F. Supp. at 21. There is simply no explanation for counsel's failure to investigate these alternatives.

It is important to note that in the same case counsel requested the Sheriff of Cook County to protect a witness. (R. 138-138) Once again, there is no explanation for counsel's failure to ask for the same protection for the alleged alibi witnesses.

Petitioner's failure to seek reasonable alternatives for presenting the evidence can also be seen during post-trial proceedings. At that time it was clear that there had been no reprisals against co-defendant Knights' witnesses. Despite this petitioner failed to disclose any additional information about his alleged witnesses, which might have caused the trial court to change its prior ruling and grant a new trial and which most certainly would have fully developed the record on appeal.

Finally, the district court found no "explanation for Adam's failure to provide the trial judge with information about the witness *in camera.*" 586 F. Supp. at 19. Once again the court's conclusion was a correct one. Counsel claimed to have access to the witnesses' written statements to the trial court with the names and addresses of the witnesses excised. This would have protected the witnesses and allowed the court to consider the specific nature of the evidence, thereby complying with Illinois procedural rules.

It is equally clear that petitioner has not shown cause where, following the trial court's ruling, he did not approach the witnesses and again try to convince them to testify. He also failed to subpoena the witnesses or move to have them called as witnesses for the court. In light of this deliberate course of conduct petitioner cannot now claim that cause existed for his procedural default.

The decision in *United States ex rel. Spurlark v. Wolff,* 699 F.2d 354, 361-362 (7th Cir. 1982), should provide guidance in the present case. There, petitioner was convicted of a drug-related offense. Sam Adam, also counsel in this case, later moved to appear on petitioner's behalf during sentencing proceedings and the trial court denied the request. Petitioner appealed but did not raise an issue alleging that he was denied the right to counsel of choice at sentencing. Petitioner subsequently was successful in the district court in seeking habeas relief concerning the same issue. This Court reversed, holding:

> Regardless of how one defines "cause" that prong of the (cause and prejudice) test is not met here. It is apparent that counsel did not view the choice of counsel at sentencing as an important issue and simply ignored it as an issue on appeal. This is not the type of cause that justifies ignoring petitioner's failure to raise the issue on appeal.

699 F.2d at 361. Although *Spurlark* deals with a procedural default resulting from a waiver on appeal, it is highly analogous to this case because it is equally clear that petitioner has failed to demonstrate cause here where he either ignored or gave merely the slightest attention to the problems of witness protection, seeking alternate means of presenting the alibi testimony and informing the court of the specific nature of the evidence.

Reed v. Ross, ____ U.S. ____, 104 S.Ct. 2901, 83 L.Ed. 2d 1 (1984), relied on by petitioner, does not support his argument that cause existed. In fact, respondent contends that the case clearly demonstrates why habeas relief is not proper in this case. In *Ross*, this Court discussed "cause" as it arose from the Court's own decisions which:

> [A]rticulated a constitutional principle that had not been previously recognized but which is held to have retroactive application.

83 L.Ed.2d at 15. Because the procedural default here was based on petitioner's failure to comport with well settled Illinois law, the rule stated in *Ross* demonstrates that habeas relief is not proper in this case.

A closer examination in *Ross* demonstrates the weakness in petitioner's argument. There, this Court noted:

> Underlying the concept of cause, however, is at least the dual notion that, exceptional circumstances, a defendant is bound by the tactical decisions of competent counsel (citations omitted), and that counsel may not flout state procedures and then turn around and seek refuge in federal court from the consequences of such conduct . . .

83 L.Ed.2d at 16. Respondent contends that this is precisely what petitioner is attempting to do in the present case. As Justice Coffey correctly recognized in his dissent

in *Veal*, counsel's failure to make an offer of proof was a tactical decision based on counsel's desire to create an issue on appeal. *Veal v. DeRobertis*, 693 F.2d at 651-52 (Coffey, J., dissenting). At the time of its ruling, the trial court ruled that the alibi testimony would be admissible if counsel would merely disclose the names of the witnesses. However, it is clear that counsel was intent upon framing a challenge to the Notice-of-Alibi statute, for counsel stated:

> We are saying that we have witnesses. We want to call the witnesses and will not tell the State who the witnesses are. The question now is will your Honor let them testify or not testify. It's just that simple your Honor. Rule and we'll go on to something else.

People v. Veal, 374 N.E.2d at 991. It is clear from this that once counsel obtained the ruling he wanted he pushed the court to another matter before the court reconsidered its ruling. In so doing, petitioner made a tactical choice to by-pass the state court's orderly procedure for raising as error the possible exclusion of witnesses. *Veal*, 693 F.2d at 651 (Coffey, J., Diss.).

Petitioner argues that the offer of proof requirement was sufficiently novel to establish cause. However, this argument must fail because petitioner's trial attorney attempted to make such an offer at trial. As the appellate court recognized, "if (petitioner's) counsel truly believed an offer was unnecessary, it is curious that he would nevertheless attempt to make one." *United States ex rel. Veal v. DeRobertis*, 693 F.2d at 649.

Petitioner relies on the decision in *People v. Lynch*, 104 Ill.2d 194 (1984), to support his argument that an offer of proof was unnecessary. (Pet. at 8) However, in that case the defendant was seeking to impeach a prosecution witness with prior convictions for battery. The Illinois

Supreme Court held that because the purpose and materiality of the evidence in question was apparent from the questions asked, there was no need for an offer of proof. 104 Ill.2d at 202. The present case is decidedly different because defense counsel's attempted offer of proof failed to disclose any specific information about the alleged alibi evidence.

Petitioner further cites Judge Swygert's opinion in *Parisie v. Greer*, 705 F.2d 882 (7th Cir. 1983). However, in that case defense counsel made an offer of proof sufficient to apprise the trial court of the nature of the evidence offered. 705 F.2d at 900. The comment presently relied on involved the necessity of "freezing" the evidence in question by presenting it in its entirety to the trial court. Because petitioner in the present case failed to make an adequate offer of proof, the issue of "freezing" the evidence has not arisen and the reasoning employed by Judge Swygert does not apply.

Petitioner has failed to establish any reason for his failure to comply with Illinois procedural rules. He did not attempt to protect his witnesses even though the means to do so were available, and he did not attempt other means of persuading the witnesses to testify. Further, he did not attempt to inform the trial court of the nature of the excluded evidence even though he claimed to have witness statements which could have been altered to protect the witnesses. For these reasons the lower courts correctly determined that petitioner failed to establish cause.

CONCLUSION

For these reasons, respondent requests this Court to deny certiorari in this cause.

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